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The Persistent Challenge of Gender and Law: Views From One Law School's Student Body

Reynaldo Anaya Valencia
Capital University School of Law

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THE PERSISTENT CHALLENGE OF GENDER AND LAW: VIEWS FROM ONE LAW SCHOOL'S STUDENT BODY

REYNALDO ANAYA VALENCIA†
MIGUEL A. ORTIZ††

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† Professor of Law, Director of the Center for Latina/Latino Legal Studies, St. Mary's University School of Law. Adjunct Professor of Law, Texas Tech University School of Law. A.B., A.M. 1987, Stanford University; J.D. 1990, Harvard Law School. I would like to thank Miguel Ortiz for his visionary suggestion that he undertake a survey (which served as the original basis for this work) for his class project for my Gender Discrimination class in the Fall 2000 semester. I also extend my sincere appreciation to the Editorial Board of THE SCHOLAR: ST. MARY'S LAW REVIEW ON MINORITY ISSUES, whose unparalleled dedication, gentle prodding, and superb research and editorial assistance brought this project to its completion. Finally, thank you to my secretary, Alma Canales, whose secretarial assistance once again proved invaluable.

†† Attorney at Law, J.D. 2000, St. Mary's University School of Law.

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN[1]

A NARRATIVE FROM PROFESSOR REYNALDO ANAYA VALENCIA

In 1991, at the height of the Clarence Thomas confirmation debacle, I was in full-time practice with a large international law firm while also teaching Gender Discrimination as an adjunct professor at a regional law school. Having graduated from law school only a year earlier, the Hill-Thomas controversy was utterly enthralling for me as a newly minted lawyer/law professor. Moreover, as someone with a long-standing interest in and commitment to the areas of racial equality and gender equality, as well as the related intersectionalities of these factors, and who was currently teaching a law school course in this area, I was compelled and virtually required to follow the proceedings closely. Accordingly, while I was away at work I videotaped many of the proceedings and then went home each night to keep up with what had transpired throughout the day. The fact that all of this activity occurred before I had yet to cover the issue of sexual harassment in my Gender Discrimination course for the semester was simply too much of a professorial dream. Although I did not realize this at the time, such fortuitous happenstance moments are what educators often refer to as a "teachable moment."[2] For me, the Hill-Thomas controversy would become a true teachable moment in the broadest sense of the term.

A year after the controversy broke, I walked into my Gender Discrimination classroom on the day that sexual harassment was the topic for the

1. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR 3d Comm., 34th Sess., 107 plen. mtg., Annex 1, at 194-5, U.N. Doc. A/34/L.61 (1979) (defining "discrimination against women"), *available at* http://www.un.org/womenwatch/daw/cedaw [hereinafter CEDAW]. CEDAW is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, CEDAW defines what constitutes discrimination against women and establishes an agenda for national as well as international action to end such discrimination. To date, the United States has failed to ratify CEDAW. *See* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 659 (2001) (stating that the convention was signed by President Carter, but has yet to be ratified by the Senate).

2. DICTIONARY OF EDUCATION 586 (Carter V. Good ed., 3d ed. 1973) (describing the teachable moment as that "time when conditions for learning are optimum").

class meeting. As a springboard for the class discussion I used a videotape of Professor Hill's opening testimony before the Senate Judiciary Committee in which she laid out all of her claims and grievances against then-Judge Thomas. Following the videotape, I turned to the reading materials for the day, consisting of some court opinions and law review articles on the topic of sexual harassment. Afterwards, in order to get the class discussion started, I decided I would randomly call on a student and ask the student's views regarding Professor Hill and her allegations. Completely oblivious to any politically charged context, I called on the young woman directly in front of me in the first row of the classroom and asked for her views regarding what we had covered thus far during the class period. What happened next is singularly the most surprising and difficult student revelation that has ever occurred in my over eleven years as a legal educator.

Much to my surprise and amazement, the student began her response to my inquiry by stating that the issue of sexual harassment was something that was very important and personal to her and that she probably had a very different opinion and perspective from the rest of her classmates because she, herself, had been the victim of unwanted sexual harassment advances by *one of the faculty members at the law school.* The student then very matter-of-factly proceeded to recount the whole ordeal—including unwanted attention, touching, letters, notes, phone calls, messages, gifts, etc.—for the entire class while I stood at the front of the room utterly dumbfounded wondering how to handle this exceedingly disturbing revelation. The teachable moment from the year earlier seemed never-ending. While not naming the alleged perpetrator by name, the student nevertheless provided many specifics about the person such that although I as a relatively new adjunct professor had no idea whom she was referring to, the other students in the forty-five member class quickly identified the faculty member.

Following her revelation, several students asked numerous questions and the student calmly responded to each one. The student also explained that at the time of the incident she told her best friend, a woman who was also in the Gender Discrimination class and actually seated immediately next to the student in question. Her best friend fully corroborated the entire ordeal for the class and further described the fear, confusion, and frustration experienced by the student at the time of the incident. The student concluded by explaining to the class that although she had kept all of the evidence, including the notes and taped telephone messages, ultimately she decided not to do anything about the incident, and that she simply wanted to forget the whole ordeal because she did not want the law school faculty to view her as a "troublemaker," and thereby somehow possibly impede or otherwise affect her law school and/or legal career. Quite honestly, I do not recall how the class meeting

ended, other than we were all moved, disturbed and shaken by the student's allegations and revelations.

The next day I returned to my full-time practice job where a few of the full-time faculty members from the law school telephoned me to inquire about the bombshell that had been dropped in my class the day before. One professor who telephoned was specifically concerned and worried about the student's fear that the faculty would somehow ostracize her should she choose to come forward and do something about the incident. This professor and I discussed what we felt was the best manner to convey to the student, that should she determine to go forward, she would not face a completely unsympathetic and/or hostile faculty, but rather would have support from at least some of the faculty. The support that the professor and I discussed was not so much to help the student topple or ruin one of our fellow professional colleagues, but rather support of a student in attempting to investigate and get to the truth of very troubling allegations. At some point, I also recall discussing the issue with the dean of the law school, who also urged me to communicate to the student that should she go forward, the law school and university would treat her allegations with complete discretion and utter fairness.

Despite all of this forthcoming support, the student ultimately determined that she did not want to go forward and file a formal complaint. In the end, she was touched and relieved that at least some faculty were sensitive to the entire issue, but remained concerned about subjecting herself to the scrutiny of faculty, staff, and students at the law school.

In the almost decade following this incident, I have remained mystified, troubled, and concerned as to why not only this student, but several other students – both male and female – in different law schools where I have taught and under different circumstances, have chosen not to proceed with formal complaints in the context of what appear to be quite serious situations of sexual harassment and gender discrimination. I understand that the literature is replete with reports and an analysis of this "failure to report" phenomenon regarding why very intelligent and accomplished people in all types of work environments simply choose not to "make noise" and forego initiating any formal proceedings to address their gender based complaints.[3] Thus, when Miguel A. Ortiz, a then third-year student in my Fall 2000 Gender Discrimination class at the St. Mary's

3. *See, e.g.*, Shirley Feldman-Summers, *Analyzing Anti-Harassment Policies and Complaint Procedures: Do They Encourage Victims To Come Forward?* 16 LAB. LAW. 307, 309 n.11-12 (2000) (discussing failure to report instances of sexual harassment); Donna Shestowsky, Note, *Where is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials*, 51 STAN. L. REV. 357 (1999) (discussing the role of "failure to report" in lawsuits explaining why expert testimony is necessary on the issue). Professor Lucie E. White has observed:

University School of Law in San Antonio, Texas, suggested conducting a survey of the St. Mary's law student community on the issue of sexual harassment and gender equality in general as the basis for his class paper, I not only encouraged his proposal, but supported it wholeheartedly. What follows, therefore, is an edited and revised version of Miguel's findings.[4]

This collaborative work, which began as Miguel's student project, provides some insight into how–despite the unquestionable consciousness-raising of the Hill-Thomas hearings on this issue[5]–sexual harassment and gender equality remain a challenge in contemporary American legal education and American society in general. Importantly, however, since this work began as a student survey at one law school at one particular point in time, we do not mean to suggest or imply that these findings are illustrative of what is transpiring throughout greater United States society or

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> [A] range of evidence suggests that women and other subordinated groups do not in fact participate in legal proceedings as frequently or as fluently as socially dominant groups. The work of Kristin Bumiller documents how women and minorities injured by discrimination often choose to forego legal remedies, rather than risk the trauma that they expect courtroom exposure to entail. A few case studies look closely at what happens when women dare to bring gender-linked injuries into court. And a growing body of empirical work broadly surveys the experiences of women in court . . . and concludes that, in all of these roles, many women continue to perceive themselves to be an unwelcomed presence in the courtroom.

Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1, 20 (1990) (citations omitted).

4. Given the stereotype of the *macho* Latino male, it is worth noting the perhaps ironic, if not at least interesting, fact that unlike the vast majority of legal scholarship focusing on gender, this work results from the collaborative efforts of two Latino men—a Puerto Rican male student who sought and obtained permission and guidance from his Mexican-American male professor for a class project. For a general discussion of *machismo* in Latino culture, *see, e.g.*, MUY MACHO (Ray Gonzalez, ed. 1996); Reynaldo Anaya Valencia, *On Being an "Out" Catholic: Contextualizing the Role of Religion at LatCrit II*, 19 UCLA CHICANO-LATINO L. REV. 449, 460-466 (1998) (discussing the role of the Catholic church in perpetuating and reinforcing notions of *machismo* in Mexican-American culture).

5. Not surprisingly, the Hill-Thomas controversy spawned an avalanche, indeed a plethora of publications–much too numerous to even attempt to catalog here–focused on the issue of sexual harassment and providing critical analysis of this transformative moment in American history. One of the more important of these works is a book co-edited by Professor Hill herself. Published in 1995, THE LEGACY OF THE HILL-THOMAS HEARINGS: RACE, GENDER AND POWER IN AMERICA (Anita Faye Hill & Emma Coleman Jordan, eds.) has as its genesis a conference held at the Georgetown University Law Center in October 1992, a year after the controversy. The contributors to the book are the conference participants, including Professor Hill, whose first published essay on this matter is included and titled *Marriage and Patronage in the Empowerment and Disempowerment of African American Women. Id.* at 271. Another important work is obviously Professor Hill's own book on the controversy entitled SPEAKING TRUTH TO POWER (1997).

American law schools as a whole. What this work does provide, however, is some empirical basis for considering how and in what ways the issue of sexual harassment and gender equality continues to be a challenge nearly a decade after the Hill-Thomas hearings.

I. INTRODUCTION

It is undeniable that the status of women in greater American society has improved dramatically since the 1960s. While these changes have resulted from a combination of continuing demographic shifts, efforts of women's and other progressive organizations, governmental policies and increased social consciousness, continuing challenges remain—particularly with respect to the hallmark socio-political institutions in which power and influence is concentrated in contemporary U.S. society. Despite these roadblocks, however, the struggle for gender equality persists and remains an on-going battle to suppress the negative impact of gender discrimination. Like all struggles for civil rights in the United States, the fight for gender equality is ultimately an effort to make real the Declaration of Independence's articulated, and oftentimes unrealized, lofty aspiration that all people—not only men—be treated equal.

This work reports the findings of a survey of law students conducted at St. Mary's University School of Law (St. Mary's Law) in San Antonio, Texas, in the Fall 2000 semester. Modeled after and developed largely from a similar survey structured and utilized by the United States Merit Systems Protection Board to measure the issue of sexual harassment in the federal workforce,[6] the survey measured the attitudes of St. Mary's law students on a variety of gender-related issues.[7] The 150 student sample consisted of the following three survey groups: 1) one section of the first year students (67 students), 2) one "core"[8] course of second and

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6. *See* U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE, TRENDS, PROGRESS AND CONTINUING CHALLENGES (1995).

7. In this respect, this work is similar to, but differs from, the rich literature involving the experiences of women in legal education and in the legal profession. *See, e.g.*, ABA COMMISSION ON WOMEN IN THE PROFESSION, ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION (1996); Ann Bartow, *Still Not Behaving Like Gentlemen*, 49 U. KAN. L. REV. 809 (2001); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PENN. L. REV. 1 (1994). While the St. Mary's Law Survey inquired into women's experiences in law school and expectations for career advancement following graduation, the instant survey also queried other similarly important and difficult areas. All views, opinions and/or commentary contained herein are those of the authors' only, and are in no way meant to suggest and/or reflect the opinions, policy and/or belief's of St. Mary's University, its faculty, or staff. The questionnaire survey and resulting data are on file with author Miguel Ortiz.

8. *See* ST. MARY'S UNIVERSITY SCHOOL OF LAW, ST. MARY'S UNIVERSITY SCHOOL OF LAW: STUDENT HANDBOOK 5 (Aug. 2001) (describing the "core" courses offered at St.

third year students (48 students), and 3) one "perspective"[9] course of second and third year students (35 students). A total of sixty-nine men and eighty-one women from the three survey groups participated in the final survey.

While a thorough treatment of the legal and theoretical framework for the areas surveyed is beyond the scope of this work, each of the following sections nevertheless begins by providing enough such background to help frame, contextualize and understand the survey's findings. Part II of this work will discuss the survey's findings with respect to gender equality within the legal profession. Part III discusses the survey's findings regarding sexual harassment within the government and private workforce. Part IV addresses the survey's findings with respect to the issue of rape and the increasing rate of this act of violence. Part V provides an overview of the survey's findings with respect to the issue of domestic violence. Part VI will discuss the survey's findings regarding abortion and other reproductive rights issues. Finally, Part VII provides some concluding thoughts and observations.

II. GENDER AND THE LEGAL PROFESSION

Even in the United States where equality of opportunity is arguably closer at hand than in most parts of the world, it is nevertheless often difficult for women to enter into the professional sector. Moreover, even if women are successful in breaking into the traditional industries of power, it is oftentimes still more difficult for them to advance as quickly and to the same degree as their male counterparts,[10] and the fact remains that women are often paid less than men for the same work.[11] With respect to the legal profession, the news is somewhat encouraging. For example, in 2001 for the first time in U.S. history, women comprised over one half of all entering students in the nation's law schools.[12] Nevertheless, women law graduates have a more difficult time obtaining employ-

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Mary's Law, including: all first year courses [i.e., Property, Contracts, Torts, Criminal Law, Constitutional Law, and Federal Procedure]; Professional Responsibility; Evidence, and Texas Civil Procedure).

9. *See id.* (describing the "perspective" courses offered at St. Mary's Law including, but not limited to: Race, Racism & American Law; Laws in Radically Different Cultures; Law and Literature, and Legal Philosophy) .

10. *See, e.g.*, FEDERAL GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 143-155 (1995).

11. *See generally* Kristin McCue & Manuelita Ureta, *Women in the Workplace Recent Economic Trends*, 4 TEX. J. WOMEN AND L. 125 (1995).

12. *See, e.g.*, Kristin Choo, *The Right Equation: Despite Increasing Numbers of Female Lawyers, Gender Equality May Not Be Guaranteed in the Future*, ABA J., Aug. 2001, at 58; Cynthia Fuchs Epstein, *Women in the Legal Profession at the Turn of the Twenty-First Century: Assessing Glass Ceilings and Open Doors*, 49 U. KAN. L. REV. 733, 741 (2001).

ment with the largest, most prestigious and highest-paying law firms.[13] And, the few who succeed in obtaining associate positions in these work settings face a more difficult time than men in being promoted to a partnership position. In New York City, for example, 17% of male associates hired after 1981 made partner compared to only 5% of female associates.[14] This is only one of several statistics that illustrate why 94% of all women who started working at New York City's top law firms in 1987 have since left their jobs.[15]

Despite such shortfalls, today women have dramatically increased their membership in state bar associations throughout the United States, but are still far from achieving parity with their numbers in the general population. In 1982, for example, women comprised only 13% of the State Bar of Texas.[16] Today, women's membership has increased to over 27% in this organization,[17] but career opportunities may remain limited. For instance, as exemplified by the most recent figures provided to the National Association of Law Placement by the three major Texas-based law firms—Baker Botts, Fulbright & Jaworski, and Vinson & Elkins—many large law firms have approximately equal numbers of men and women associates, but this equality in the lower ranks virtually disappears at the partnership ranks.[18] For example, as of February 1, 2001, Baker Botts reported a total of 255 attorneys in its Houston office: 79 male associates and 62 female associates, and 87 male partners and 12 women partners.[19] Similarly, Fulbright & Jaworkski reported a total of 354 attorneys in its Houston office: 70 male associates and 30 female associates, and 111 male

13. *See* Wynn R. Huang, Comment, *Gender Differences in the Earnings of Lawyers*, 30 COLUM. J.L. & SOC. PROBS. 267, 271-72 (1997); Amy Bach, *Life v. The Law*, N.Y. MAG., Dec. 11, 1995, at 50. *See generally* Ann J. Gellis, *Great Expectations: Women in the Legal Profession, A Commentary on State Studies*, 66 IND. L.J. 941, 947-49 (1991) (analyzing the salaries of women lawyers compared with their male counterparts).

14. *See* Bach, *supra* note 13, at 50.

15. *See id.*

16. *See* CAROL CANNON & KEVIN J. PRIESTNER, STATE BAR OF TEXAS, STATISTICAL PROFILE OF THE STATE BAR OF TEXAS MEMBERSHIP (2000-01) 2 (2001). At that time, 13% constituted less than 5,000 female attorneys in Texas. *See id.*

17. *See id.* Women are projected to comprise approximately 34% of the State Bar of Texas by 2005. *See id.*

18. *See* NAT'L ASS'N FOR LAW PLACEMENT, DIRECTORY OF LEGAL EMPLOYERS (2001). It is important to note that while this section focuses on these three firms, they were chosen only because they constitute a major legal presence in Texas. Similar, and perhaps more disturbing, data can be gleaned from virtually every major law firm in Texas and throughout the United States. In this regard, therefore, these three firms are no worse, and in many instances far better, than their counterparts in terms of women in higher echelons of power.

19. *See id.* at 1650.

partners, and 12 women partners.[20] Additionally, Vinson & Elkins reported a total of 392 attorneys in its Houston office: 111 male associates and 73 women associates, and 152 male partners, and 30 women partners.[21]

These disparities apparently begin early in the law graduate's career. For example, a recent study of new lawyers conducted by the State Bar of Texas found that while 62% of the overall Class of 2000 graduates were employed, the percentage for men was 67%, compared to 56% for women.[22] Moreover, despite their work situation, most women are still expected to maintain their workload within the home in addition to their jobs in the workforce.[23] Such expectations derive from the still pervasive belief that most domestic work is "women's work."[24] Because such tasks are usually performed by women and do not produce any income, "women's work," such as housework and child-rearing, often go unrecognized as work.[25] All of this contributes to the continuing challenges that today's law students–both male and female–face with respect to a more balanced male/female student body and legal profession which will hopefully better reflect and appreciate the contributions of women.[26]

St. Mary's Law Survey Results

With all of the foregoing as a backdrop, the survey respondents were asked whether they believed gender would play a roll with respect to their chances for employment. Not surprisingly, 74% of the females agreed that gender would play a roll in their chances for employment, whereas only 44% of the men agreed.[27]

With regard to whether these students believed that men dominate the legal profession, 60% of the men and 84% of women agreed. It appears, therefore, that the male survey respondents are quite aware of their privileged position within the legal profession. On the other hand, it should

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20. *See id.* at 1654.

21. *See id.* at 1676.

22. *See* CYNTHIA L. SPANHEL & KEVIN J. PRIESTNER, STATE BAR OF TEXAS, CLASS OF MAY 2000: EMPLOYMENT REPORT 2 (2001).

23. *See* MARILYN WARING, THE EXCLUSION OF WOMEN FROM "WORK" AND OPPORTUNITY IN HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 109, 111 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

24. *See id.* at 111, 116-17.

25. For example, in Houston, Texas, a lawyer who chose to breastfeed her newborn child during a deposition drew a harsh reaction from her male opponent, specifically a "[m]otion to exclude gurgling infant and motion for protection" that made headlines. Debra Cussens Moss & Mark Curriden, *Baby Talk*, ABA J., Dec. 1994, at 42.

26. *See generally*, Epstein, *supra* note 12.

27. Sixty percent of the overall population participating in the survey agreed. The highest percentages were found among the African-Americans with 86%.

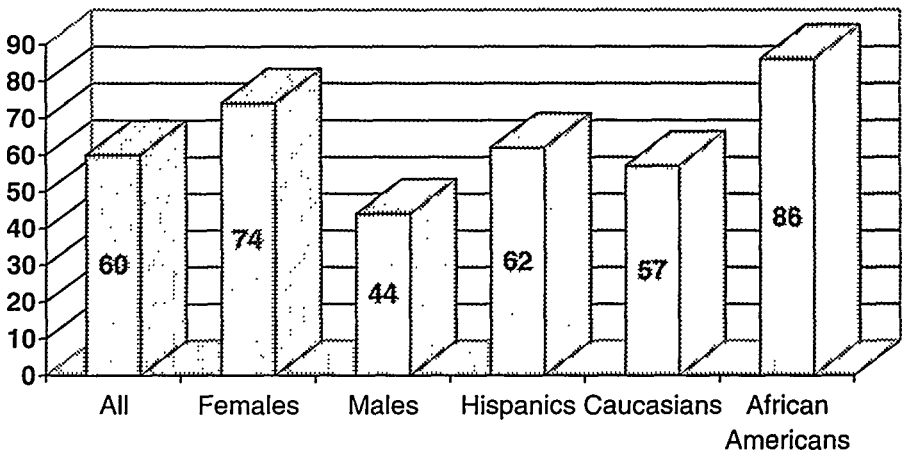

FIGURE I: WILL GENDER AFFECT FUTURE EMPLOYMENT?

be noted that as the students progressed in their legal education, the percentage agreeing that men dominate the legal profession increased from 42% of the first year students to 62% of second and third year law students.[28] Moreover, 52% of the men disagreed, compared to 60% of women who agreed, that men have better opportunities to get a job regardless of their academic standing and qualification. Importantly, a full 78% of the total participants (69% of the men and 85% of the women) disagreed with the statement that men are more academically and professionally capable as law students and lawyers.

Some of the more interesting questions in this part of the survey inquired as to the respondents' reactions to a report in the January 1996 *ABA Journal*.[29] According to the report, a female lawyer from New Jersey used sexual appeal as a tool to enhance her legal practice by appearing in various advertisements in a sexually provocative manner.[30] In the article, the attorney claimed that as a result of such advertising, her legal practice increased by a significant amount.[31] The attorney explained that her actions were in response to a male-dominated area of the law (business), and believed that her actions were personal in nature and should in no way be a reflection of or cause for underestimating women

28. Perhaps the change is due to the increasing exposure to the legal community and the better understanding of the current problems therein.

29. *See* Brian Sullivan et al., *Blond Ambition: Leggy Lawyer Poses, Profits*, ABA J., Jan. 1996, at 12.

30. *See id.*

31. *See id.*

lawyers in general.[32] When asked whether they agreed with this lawyer's beliefs and assertions, the survey respondents generally disagreed.

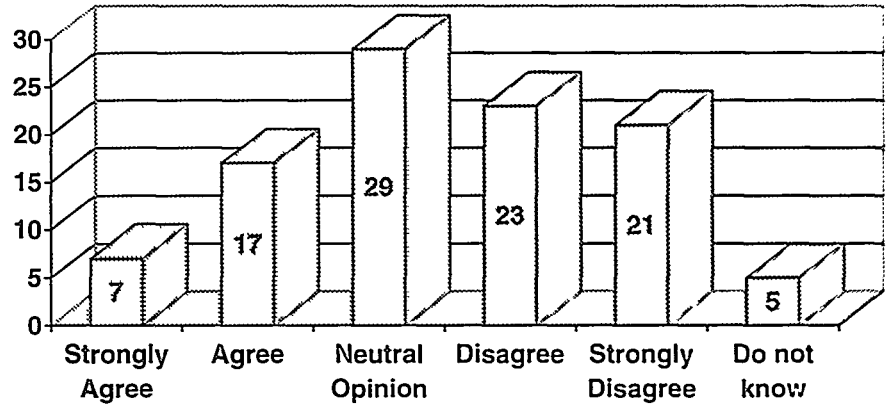

FIGURE II: ATTORNEY'S ACTIONS REFLECT ONLY ON HER?

Moreover, while some might expect women respondents to be more sensitive and/or empathetic to the New Jersey attorney's solution for combating what she considered unfair gender discrimination, 49% of all women respondents either disagreed in part or in whole with her approach. Interestingly, an additional 26% of women respondents indicated they had no opinion on the issue. In general, the overall results to this part of the survey indicate that both men and women, but women to a larger extent, perceive the legal profession as continued to be marked by inequities in opportunities for male and female law students and lawyers.

III. SEXUAL HARASSMENT

Even before the Hill-Thomas hearings, the issue of sexual harassment had already gained national prominence as a result of successful efforts by feminists and other civil rights activists to move the issue to the forefront of American consciousness. Indeed, pursuant to the requirements of the Civil Service Reform Act of 1978,[33] the United States Merit Systems Protection Board was charged with conducting periodic, wide-ranging studies to examine the issue of sexual harassment in the federal workforce.[34] Thus far, the Board has conducted such studies and issued reports in 1980, 1987, and 1995. The most recent report, *Sexual Harass-*

32. *See id.*
33. 5 U.S.C. § 1204(a)(3), (e)(3) (1994).
34. *See id.*

ment in the Federal Workplace: Trends, Progress and Continuing Challenges,[35] was published in October 1995, and updated the findings of the 1980 and 1987 studies. In his transmittal letter to the President and the Congress accompanying the 1995 report, the Chairman of the U.S. Merit Systems Protection Board concluded, "The results of the current study indicate that unwanted sexual attention remains a widespread problem in the Federal sector. At the same time, however, Federal agencies have made strides in educating their workforces and raising the level of sensitivity to the issues surrounding sexual harassment."[36]

Concomitant with the U.S. government's attempt to monitor and assess the issue of sexual harassment within the federal workplace, legal claims involving sexual harassment began making their way to and through the courts. In 1986, the Supreme Court of the United States issued its first sexual harassment ruling in the landmark case of *Meritor Savings Bank v. Vinson*.[37] In *Meritor*, the Court determined that, "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"[38] Subsequent to *Meritor*, the Court has refined and defined terms of art and further developed principles relating to legal liability in this complex area of the law.[39]

As previously noted, while an in-depth treatment of sexual harassment law is beyond the scope of this article, the two general types of sexual harassment recognized and actionable under current law need to be understood in order to appreciate the results of the survey at issue. The first form of sexual harassment is referred to as "*quid pro quo,*" and the second is referred to as "hostile work environment." Quid pro quo sexual harassment is fairly straightforward: conditioning employment decisions (including hiring, firing, promotion, salary, etc.) on sexual behavior and/or acts is illegal.[40] The second form of prohibited sexual harassment is

35. U.S. MERIT SYSTEMS PROTECTION BOARD, *supra* note 6.

36. *Id.* at I.

37. 477 U.S. 57 (1986).

38. *Id.* at 68.

39. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton 524 U.S. 775 (1998); Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993). *See generally* Diana P. Scott, *Latest Developments in Sexual Discrimination and Harassment*, 49 A.L.I. 401 (Nov. 2000).

40. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 75 (1986); *see also* Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at* Meritor Savings Bank, FSB v. Vinson, 44 VAND. L. REV. 1229 (1991); Eugene Scalia, *The Strange Career of Quid Pro Quo Sexual Harassment*, 21 HARV. J.L. & PUB. POL'Y 367 (1998); Ronald Turner, *Employer Liability Under Title VII for Hostile Environment Sexual Harassment by Supervisory Personnel: The Impact and Aftermath of* Meritor Savings Bank, 33 HOW. L.J. 1, 6 n.10 (1990).

the so-called "hostile work environment," which is legally actionable when an environment consists of conduct which is unwelcomed, based on sex, and severe or pervasive enough "to alter the conditions of the victim's employment and create an abusive working environment."[41] This standard, however, raises numerous additional questions such as what is "unwelcome" conduct, when is such conduct based on sex, and whose perception about whether behavior is appropriate or inappropriate should be determinative?[42] Indeed, even the Equal Employment Opportunity Commission, whose guidelines on hostile work environment[43] served as the basis for the *Meritor* decision,[44] itself has declared: "Title VII does not proscribe all conduct of a sexual nature in the workplace."[45] The distinction between acceptable sexual conduct and sexual harassment, therefore, is highly dependent on the perception of the parties at issue.

For example, in *Harris v. Forklift Systems*,[46] the United States Supreme Court declared:

> When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated. . . . '[M]ere utterance of an . . . epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment–an environment that a reasonable person would find hostile or abusive–is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation. . . . [W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a

41. *Meritor*, 477 U.S. at 67.

42. *See generally* Katrina Grider et al., *The Reasonable Woman Standard in Hostile Environment Litigation*, TEX. B.J. 52 (1992).

43. *See* 29 C.F.R. § 1604.11 (2001).

44. *Meritor*, 477 U.S. at 66.

45. Equal Employment Opportunity Comm'n, *Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990), *available at* http://www.eeoc.gov/dols/currentissues.html (last modified June 21, 1999); *see also* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 709 n.85 (1997).

46. 510 U.S. 17 (1993).

mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.[47]

St. Mary's Law Survey Results

As outlined above, contemporary sexual harassment law relies heavily on distinctions and differentiations between welcomed and unwelcomed sexual advances, behaviors and climate. Thus, understanding what the actor intended and, perhaps more importantly, how the victim perceived the conduct are all relevant areas of legal inquiry. On this point, the survey conducted at St. Mary's University School of Law drew from the questions asked in the U.S. Merit Systems Protection Board survey relating to perceived conduct which may constitute sexual harassment. More specifically, the St. Mary's respondents were asked whether they would classify the following five kinds of behavior as sexual harassment:

1. Uninvited letters, telephone calls, or materials of sexual nature.
2. Uninvited and deliberate touching, leaning over, cornering, or pinching.
3. Uninvited sexually suggestive looks or gestures.
4. Uninvited pressure for sexual favors.
5. Uninvited sexual teasing, jokes, remarks.[48]

The St. Mary's Law survey asked respondents whether they considered the above behaviors to constitute sexual harassment, if such behavior were: 1) from a supervisor, 2) co-worker, or 3) a friend. The respondents' answers to the survey are set forth below, and compared to similar survey responses from U.S. federal government employees in the survey conducted by the U.S. Merit Systems Protection Board.[49]

Percentage Who Considered It Harassment

	St. Mary's Students		Federal Gov't Employees	
From a Supervisor	Men	Women	Men	Women
Letters, telephone calls, or materials of sexual nature.	78	89	87	94
Touching, leaning over, cornering, or pinching.	78	96	93	98
Sexually suggestive looks or gestures.	80	83	76	91
Pressure for sexual favors.	96	95	97	99
Sexual teasing, jokes, remarks, or questions.	73	89	83	73

47. *Id.* at 21-23 (citations omitted).

48. These questions were similar to those asked in the U.S. Merit Systems Protection Board Survey. *See* U.S. MERIT SYSTEMS PROTECTION BOARD SURVEY *supra* note 6, at 61.

49. *See id.* at 7.

From a Co-worker				
Letters, telephone calls, or materials of sexual nature.	63	81	81	92
Touching, leaning over, cornering, or pinching.	67	94	89	96
Sexually suggestive looks or gestures.	65	76	70	88
Pressure for sexual favors.	92	94	93	98
Sexual teasing, jokes, remarks, or questions.	64	83	64	77
From a Friend				
Letters, telephone calls, or materials of sexual nature.	29	50	N/A	N/A
Touching, leaning over, cornering, or pinching.	37	72	N/A	N/A
Sexually suggestive looks or gestures.	42	52	N/A	N/A
Pressure for sexual favors.	77	87	N/A	N/A
Sexual teasing, jokes, remarks, or questions.	31	56	N/A	N/A

FIGURE III

The 1995 U.S. Merit Systems Protection Board survey found that 44% of female federal government workers and 19% of male federal government workers reported being victims of unwanted sexual attention during the two years preceding the survey. By comparison, the St. Mary's Law survey found that 57% of the women and 37% of the men reported they had been victims of one or more sexual harassment behaviors described above within the last three years. Moreover, the results of both surveys demonstrate that as the degree of personal relationship increased, the less likely the respondents classified the behavior as sexual harassment. Furthermore, as demonstrated in the data above, men in the St. Mary's Law survey were more reluctant and less inclined than women to consider any of the above behaviors sexual harassment–irrespective of whether the behavior was on the part of a supervisor, co-worker, or friend. This finding would suggest that on the whole, the male respondents in the survey were more willing to tolerate such behaviors. Indeed, this sentiment is best exemplified by one of the respondents who commented, "It would be nice to be wanted by the boss."

On another front, and consistent with the "failure to report" phenomenon referred to in the introductory narrative to this article,[50] the respondents to the St. Mary's Law survey revealed a disturbing reality that no men, and only 20% of women, reported such harassment to someone else. On a more positive note, 64% of male and 70% of female harassment victims reported that eventually the harassment ceased. Interestingly, 84% of the men and 51% of the women do not see themselves as future victims of sexual harassment. These findings beg a more interesting question: given that a large number of respondents reported being

50. *See supra* note 3 and accompanying text.

victims of sexual harassment, why is it that the majority of these same individuals did not see themselves as future victims?

On the other hand, in response to whether they would report such behavior if it happened to them in the future, 27% of the women and 35% of men said that they would. Significantly, over one-half (51%) of the women indicated that they would talk to the harasser first and see what happens.

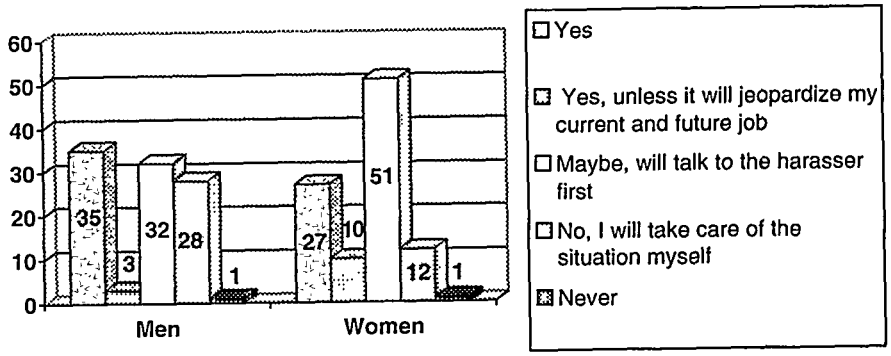

FIGURE IV: WILL REPORT UNWANTED ADVANCES (BY GENDER)?

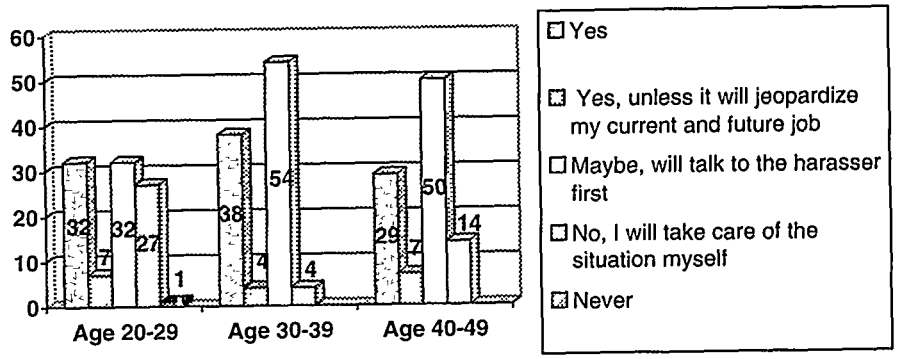

FIGURE V: WILL REPORT UNWANTED ADVANCES (BY AGE)?

In a 1998 case, *Oncale v. Sundowner Offshore Services, Inc.*,[51] the Supreme Court issued its first sexual harassment ruling addressing the issue of same-sex harassment. In *Oncale*, the Supreme Court determined that same-sex sexual harassment is actionable under Title VII of the 1964 Civil Rights Act and the relevant caselaw pursuant thereto,[52] finding no justifi-

51. 523 U.S. 75 (1998).

52. *See id.* at 82. Justice Scalia delivered the unanimous opinion of the Court, holding:

cation in the statutes or any precedent for a rule excluding same-sex harassment claims from the coverage of Title VII.[53]

Respondents to the St. Mary's Law survey were asked if they agreed or disagreed with the holding in *Oncale*. One of the survey's most encouraging findings was that a clear majority of all students, 81% of the men and 93% of the women, agreed with the *Oncale* holding. While there was a slight fluctuation depending on the respondent's year in law school, overall the results remained consistently high. The lowest level of agreement with the *Oncale* decision, 76%, came from first year male students.

Finally, the St. Mary's Law survey also asked respondents whether the government should enact laws to protect the rights of gays and lesbians. As the following chart demonstrates, answers to this question varied greatly among and between the groups of respondents.

While the vast majority of African Americans (86%) agreed with the enactment of legislation protecting gays and lesbians, this number is also tempered by the fact that the pool of African American respondents to the survey was quite small (7 total). Compared to the high approval rating of such laws among the small pool of African American respondents, similar support was much lower from the other respondent groups. For instance, only 49% of males and 77% of females agreed with such legislation. Disparities in the level of agreement on this issue were most apparent when the answers were compared by the age of the respondents. While only 36% of the respondents 40 years and older agreed with legislation protecting the rights of gays and lesbians, a much higher 68% of respondents age 20 to 29 agreed with such legislation. These findings suggest that age is a significant factor in how students at St. Mary's Law

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> Harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination because of . . . sex.'

Id. at 80-81; *see also* Scott, *supra* note 39, at 426.

53. *Oncale*, 523 U.S. at 79. In so holding, the Court noted,

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Id. (citations omitted).

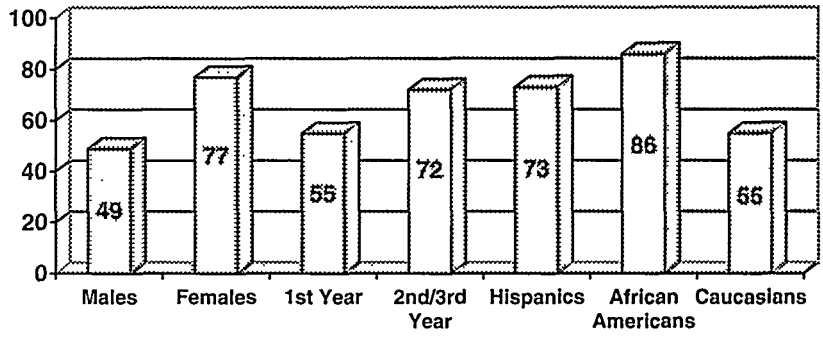

FIGURE VI: SUPPORT LEGISLATION PROTECTING GAYS AND LESBIANS

perceive and/or accept social change, with older individuals tending to be more conservative in how society should view and protect gays and lesbians. Indicative of the continuing resistance to such equality are the comments of one of the respondents who wrote, "a whole new set of rules? . . . they [gays and lesbians] should just be treated by the laws the same way men and women are."

IV. RAPE

During the Fall 2000 semester, when the St. Mary's Law survey was administered, the Federal Bureau of Investigation's (FBI) most recent annual Uniform Crime Report (UCR)[54] evidenced that between 1998 and 1999 the number of violent crimes reported in the United States declined by nearly 7%.[55] Similarly, the Bureau of Justice Statistics' (BJS) annual National Crime Victimization Survey (NCVS)[56] reported that the violent crime rate had declined by 10% within the same time period.[57] The UCR and the NCVS are two statistical programs administered by the U.S Department of Justice to measure crime in the United States.[58] Unlike the UCR, the NCVS includes an examination of both reported and unreported crimes.[59] Additionally, the NCVS, which was designed to

54. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 1999 UNIFORM CRIME REPORTS (1999), *available at* http://www.fbi.gov/ucr/cius_99/99crime/99cius.pdf.

55. *See id.* at 10-11 (noting that the 1999 figure of 1.4 million reported crimes is the lowest reported number since 1985).

56. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: NATIONAL CRIME VICTIMIZATION SURVEY (Aug. 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cr99.pdf.

57. *See id.* at 1, 3.

58. FED. BUREAU OF INVESTIGATION, *supra* note 54, at 410.

59. *See id.* at 411; BUREAU OF JUSTICE STATISTICS, *supra* note 56, at 3.

complement the UCR, includes an examination of sexual assaults in addition to forcible rapes.[60]

Although the UCR report revealed that the number of reported forcible rapes declined by 4.3%,[61] the NCVS report noted that 72% of rapes or sexual assaults were never reported to the police.[62] It also reported that there was a 20% increase in the number of rapes and that sexual assaults for the same period increased by 33.3%.[63] The report further indicated that a devastating 69% of rape and sexual assault victims knew their offender as an acquaintance, friend, relative, or intimate.[64]

In response to the report, Karen Baker, the Project Director of the National Sexual Violence Resource Center (NSVRC),[65] stated:

> While it is good news to see the overall rate of national crime victimization decreasing, it is important to notice that rape and sexual assaults are not following that trend. This is not surprising, however. We live in a society where many social and cultural influences promote sexual violence and lead to a generalized tolerance. In fact, sexual assault permeates society deeply. A crime often cloaked in denial, shame and fear, sexual assault is extremely difficult to confront and eliminate.[66]

In 1997, researchers Laura L. O'Toole and Jessica R. Schiffman observed, "[o]verwhelming evidence supports the contention that rape and coercive sexual intercourse occur frequently and are, in fact, a common experience for women in our culture."[67] Indeed, there is perhaps no place where this reality is more pronounced than on the nation's college campuses. In 1985, *Ms.* magazine surveyed approximately 7,000 students from thirty-two university campuses around the nation and found that 1

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60. FED. BUREAU OF INVESTIGATION, *supra* note 54, at 411.

61. *See id.* at 64.

62. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 56, at 11; *see also* Press Release, National Sexual Violence Resource Center, Overall Crime Victimization Rate Decreases 10% But Rape Increases 20% (Sept. 5, 2000) (noting that approximately 70% of sexual assaults and rapes go unreported) (on file with author).

63. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 56, at 3; *see also* Press Release, National Sexual Violence Resource Center, *supra* note 62.

64. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 56, at 1, 8.

65. Press Release, National Sexual Violence Resource Center, *supra* note 62. The NSVRC is dedicated to improving support systems for sexual assault survivors. *See id.* It also serves as a central clearinghouse for resources for the anti-sexual violence initiative. *See id.*

66. *Id.* For instance, according to an NSVRC estimate, 1 in 4 women and 1 in 6 men will become the victim of a sexual assault during their life. *See id.*

67. GENDER VIOLENCE: INTERDISCIPLINARY PERSPECTIVES (Laura L. O'Toole & Jessica Schiffman eds., 1997).

in 8 female students had been raped.[68] Further, the survey found that one in every 12 men admitted to having forced a woman to have intercourse or trying to force a woman to have intercourse through physical force or coercion.[69] Virtually none of these men, however, identified themselves as rapists,[70] and only 57% of the women who had been assaulted labeled their experience as rape.[71] The other 43% had not even acknowledged that they had been raped.[72] In a separate study conducted that same year, only 4% of approximately 38% of randomly selected university women who experienced an assault which was legally definable as rape or attempted rape reported the assault to the authorities.[73] Similarly, in a 1987 study of more than three thousand college women, approximately 54% indicated that they had experienced some form of sexual victimization–12% had experienced attempted rape, and 15% had experienced rape.[74] In a 1989 random sample of 481 college women, over 25% reported being coerced into non-consensual sexual activity at least once during their years in higher education, and often more than once.[75] In a 1992 study of 20 college students who were raped, none told the police, and only 15% spoke with anyone about their ordeal.[76] Finally, after presenting its findings on a host of sexual victimization issues in the college context—some of which are consistent with and some of which are inconsistent with data from prior surveys—an extremely comprehensive report issued in December 2000 by the National Institute of Justice, nonetheless concluded that, "College campuses host large concentrations of young women who are at greater risk for rape and other forms of sexual assault than women in the general population or in a comparable age group."[77]

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68. *See* Ellen Sweet, *Date Rape: The Story of an Epidemic and Those Who Deny It*, Ms., Oct. 1985, at 56, 56, 58.

69. *See id.* at 58.

70. *See id.*

71. *See id.* at 56

72. *See id.*

73. Mary P. Koss, *The Hidden Rape Victim: Personality, Attitudinal and Situational Characteristics*, 9 PSYCHOL. WOMEN Q. 193, 206 (1985).

74. Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING CLINICAL PSYCHOL. 162 (1987).

75. S. FENSTERMAKE, ACQUAINTANCE RAPE ON CAMPUS: RESPONSIBILITY AND ATTRIBUTIONS OF CRIME IN VIOLENCE IN DATING RELATIONSHIPS (Maureen A. Piro-Good & Jane E. Stets eds., 1989).

76. Crystal S. Mills & Barbara J. Granoff, *Date and Acquaintance Rape Among a Sample of College Students*, 37 SOC. WORK 504, 506 (1992).

77. BONNIE S. FISCHER ET AL., U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN iii (2000).

Perhaps one of the most contentious findings in this area was a 1983 survey conducted at one of the most elite universities in the country, Harvard University. In this survey, a startling 93% of the male students surveyed answered "yes," when asked if "they had the chance and were sure they would not get caught, they would consider forcing a women to have sex without her consent."[78]

St. Mary's Law Survey Results

In 1991, Margaret T. Gordon and Stephanie Riger published their findings regarding rape and women in the United States. In short, these researchers' most disturbing findings came in thirds: one-third of women surveyed indicated that they worried about being raped at least once a month; one-third indicated that the fear of rape was "always there;" and one-third indicated that they never worried about the issue of rape, but nevertheless reported taking precautions to avoid being the victim of a rape.[79]

The survey conducted at St. Mary's University School of Law asked the respondents how they would characterize their level of knowledge regarding the crime of rape. Fifty-five percent of the men and 75% of the women rated their knowledge of rape as "good." An additional 36% of the men and 25% of the women rated their knowledge of rape as "fair." The St. Mary's Law survey also asked whether the respondents, given their knowledge and understanding of the relevant laws, believed that contemporary laws adequately protect women from acts of rape and domestic violence. Interestingly, while 57% of women believed that current laws do not adequately protect women from acts of rape and domestic violence, only 35% of the men agreed. A full 35% of the women respondents, however, did agree that current laws protect women to some extent.

Perhaps the difference between the men and women respondents with respect to these questions is attributable to the different ways in which women and men conceive of and experience, as evidenced through the studies discussed above, the crime of rape. Susan Brownmiller in her groundbreaking work in 1975 described this experential difference as follows:

> [T]he rapist performs a myrmidon function for all men by keeping all women in a thrall of anxiety and fear. Rape is to women as lynching was to blacks: the ultimate physical threat by which all men keep all

78. *See* Iris Bennett, *Appalling Attitude Toward Rape*, HARVARD CRIMSON, Feb. 28, 1998 (commenting on results of a study of Harvard male students in 1983).

79. MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR 21 (1991).

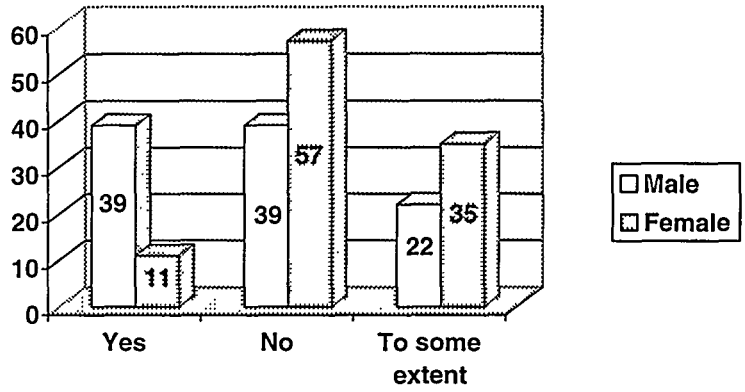

FIGURE VII: RAPE AND DOMESTIC VIOLENCE LAWS ADEQUATELY PROTECT WOMEN?

women in a state of psychological intimidation. Women have been raped by men, most often by gangs of men . . . as group punishment for being uppity, for getting out of line, for failing to recognize 'one's place,' for assuming sexual freedoms, or for behavior no more provocative than walking down the wrong road at night in the wrong part of town and presenting a convenient, isolated target for group hatred and rage.[80]

V. DOMESTIC VIOLENCE

Anglo-American jurisprudence's historical treatment of and response to the difficult issue of domestic violence is directly traceable to the English Common Law's notion of "coverture"–a concept under which a married woman's legal existence was suspended and subsumed by that of her husband's during marriage.[81] The noted Sir William Blackstone, whose *Commentaries on the Laws of England*,[82] published in 1765 served as a guiding authority for the development of much of American jurispru-

80. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975).

81. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (photo. reprint 1966) (Oxford, Clarendon Press 1765); *see also, e.g.*, Margaret J. Chriss, *Troubling Degrees of Authority: The Continuing Pursuit of Unequal Marital Roles*, 12 LAW & INEQ. 225, 227-29 (1993); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1389 (2000); John R. Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1045-46 (1972); Amy D. Ronner, *Husband and Wife Are One – Him:* Bennis v. Michigan *as the Resurrection of Coverture*, 4 MICH. J. GENDER & L. 129, 132 (1996).

82. BLACKSTONE, *supra* note 81.

dence, explained, "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."[83] As a result of this suspension of identity, explained Blackstone, and because the husband was therefore legally responsible for almost all of her acts, "[t]he husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her [his wife's] misbehavior, the law thought it reasonable to entrust him [the husband] with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children."[84] However, under the modern reign of Charles II, concluded Blackstone, such mistreatment was frowned upon, except that "the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior."[85]

Given this authoritative and entrenched historical basis, legal attempts to address the issue of domestic violence in the United States were not met with much success until the feminist movement's efforts in the 1960s and 1970s.[86] Ultimately, these successes progressed and culminated in an effort to address this complex problem nationally at the federal level. Beginning in 1990, the Senate Judiciary Committee, chaired by Senator Joseph Biden, convened a series of hearings "on the topics of rape, domestic violence, and existing legal protections."[87] The results of these hearings were summarized in a report issued in October of 1992 entitled, *Violence Against Women: A Week in the Life of America*.[88] In this report, the Senate Judiciary committee powerfully made its point regarding the magnitude of the problem by documenting 200 incidents of violence

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83. *Id.* at 430.

84. *Id.* at 432.

85. *Id.* at 433.

86. *See, e.g.*, LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 253-54 (1989); SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 29-52 (1982); Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 4-6 (2000); Reva B. Seigel, *"The Rule of Love:" Wife Beating as Prerogative and Privacy*, 105 YALE L.J., 2117, 2118 (1996); Pamela M. Jablow, Note, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1098 (2000).

87. STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG., S. PRT. 102-118, VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA III (Comm. Print 1992); *see also* Ethan Bronner, *Senate Panel to Address Rising Reports of Rape*, BOSTON GLOBE, Apr. 11, 1991, *available at* 1991 WL 7409041; Linda Chang, *Ex-Model Addresses Panel: Slashing Victim Speaks at Sex-Crime Hearing*, DALLAS MORNING NEWS, June 21, 1990, at 8A, *available at* 1990 WL 7344214; Helen Dewar, *Women Back Biden Bill for Victims: Domestic, Street Violence Targeted*, WASH. POST, June 21, 1990, *available at* 1990 WL 2124930

88. S. PRT. 102-118, *supra* note 87, at III.

against women somewhere in the United States during the week of September 1, 1992.[89] Sadly, concluded the report, "we believe the 200 incidents below represents less than one one-hundredth *of the actual violence committed against women in a single week in America.*"[90]

The specific findings of the report largely reiterated what was generally known about domestic violence, but these results were nevertheless quite unsettling and discomforting. For instance, the report's "Factual Summary," reprinted in part below, pointed out the following:

- More than *1.13 million* women are victims of *reported* domestic violence every year–by some estimates, as many as 3 million more domestic violence crimes go unreported each year.
- More than 21,000 domestic assaults, rapes and murders were reported to the police each week in 1991–twice the number of reported robberies;
- Every week, more than 2,000 women are raped; if unreported rapes are counted, the total may be as high as 12,000 per week;
- More than 90 women were murdered every week in 1991–9 out of 10 were murdered by men;[91]
- Almost one-fifth of all aggravated assaults (20 percent) reported to the police every week are reported by victims of assaults in the home;
- Women are six times more likely than men to be the victim of a violent crime committed by an intimate;
- Estimates indicate that more than one of every six sexual assaults in a week is committed by a family member.[92]

Additionally, the report further noted that four years after the Surgeon General's 1989 determination that violence was the primary public health risk for adult women in the United States, the then-current Surgeon General Antonia Novello had recently determined that violence against women continued to remain the "leading cause of injuries to women ages

89. The report explains that, "These incidents were picked randomly from responses to a telephone survey of over 200 rape crisis centers, domestic violence shelters, emergency rooms and police stations." *Id.* at 9.

90. *Id.* (emphasis in original).

91. Additionally, 1990 FBI statistics indicated that approximately one-third of all women who were murdered were murdered by their boyfriends, husbands, or lovers. *See* Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J., 231, 231-32 (1994).

92. S. PRT. 102-118, *supra* note 87, at 1-2 (emphasis in original).

15-44, more common than automobile accidents, muggings, and cancer deaths combined."[93]

Importantly, the results and findings of the report and congressional hearings ultimately served as the impetus behind and basis for the proposal and subsequent enactment of the Violence Against Women Act of 1994 ("VAWA").[94] This legislation provides funding for educational programs, seeks to strengthen existing legislative protections and support for victims of violence and domestic violence in particular, and adds additional legislative protections for such victims.[95] Summarizing the state of domestic violence law in 1999, Deborah Epstein, declared:

> Despite numerous frustrations and failures over the past thirty years, the domestic violence movement has made enormous strides. The country has moved from a time when no term for intimate abuse existed in the national lexicon to an era of substantial public awareness and political will to intervene. Every jurisdiction has now enacted civil protection order legislation, and the vast majority of these statutes authorize the essential relief necessary for battered women to leave abusive relationships. These 'basics' include provisions for emergency *ex parte* relief, so that victims have court-ordered protection during the potentially volatile period between the time of filing a lawsuit and trial . . . Modern laws governing civil protection orders also authorize fairly comprehensive post-trial relief. In addition to the basic provisions requiring the abuser to cease his assaults and stay away from the victim, these orders may award temporary child

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93. *Id.* at 3 (citing Surgeon General Antonia Novello, *From the Surgeon General, U.S. Public Health Service*, 267 J. AM. MED. ASS'N. 3132 (June 17, 1992)).

94. The Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (1994) (codified in part at 42 U.S.C. § 13981); *see* Senator Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 HARV. J. ON LEGIS. 1, 5-6 (2000); Lisa A Carroll, Comment, *Women's Powerless Tool: How Congress Overreached the Constitution with the Civil Rights Remedy of the Violence Against Women Act*, 30 J. MARSHALL L. REV. 803, 804 (1997). During the Summer of 2000, VAWA was reauthorized. *See* Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). For a general discussion of VAWA's reauthorization, see Lori Romeyn Sitowski, *Congress Giveth, Congress Taketh Away, Congress Fixeth Its Mistake? Assessing the Potential Impact of the Battered Immigrant Women Protection Act of 2000*, 19 LAW & INEQ. J. THEORY & PRAC. 259, 285-86 (2001).

95. *See* Violence Against Women Act of 1994, *supra* note 94; *see also* Leonard Karp & Laura C. Belleau, *Federal Law and Domestic Violence: The Legacy of the Violence Against Women Act*, 16 J. AM. ACAD. MATRIMONIAL LAW 173, 179 (1999); Bryan J. Orrio, Comment, *Ending the Domestic Violence Cycle Through Victim Education in Oregon's Restraining Order Process*, 33 WILLIAMETTE L. REV. 971, 993 (1997). Importantly, one of the Act's major provisions allowing for a civil rights cause of action by a victim of gender-related violence against her perpetrator was recently declared unconstitutional in *United States v. Morrison*, 529 U.S. 598 (2000).

> custody, safe visitation arrangements for the non-custodial parent, and child support. Finally, 34 states have adopted criminal contempt laws to help enforce protection orders, and 45 jurisdictions have made violating a protection order a statutory crime.[96]

Despite the legal system's progress, however limited, in addressing the issue of domestic violence, the disturbing reality is that this problem continues and may actually be on the rise. According to the National Violence Against Women (NVAW) survey conducted in 1995 and 1996,[97] nearly 22% of surveyed women and 7.4% of surveyed men said they were raped and/or physically assaulted by a current or former spouse, cohabiting partner, or date at some time in their lifetime, and 1.3% of surveyed women and .9% of surveyed men said they were raped and/or physically assaulted by a partner in the previous twelve months.[98] According to these estimates, approximately 1.3 million women and 835,000 men are raped and/or physically assaulted by an intimate partner annually in the United States.[99]

Almost 5% of NVAW surveyed women and .6% of surveyed men reported being stalked by a current or former spouse, cohabiting partner, or date at some time in their lifetime, and .5% of surveyed women and .2% of surveyed men reported being stalked by such a partner in the previous twelve months.[100] Based on these estimates, "503,485 women and 185,496 men are stalked by an intimate partner annually in the United States."[101]

The NVAW survey also found that women are significantly more likely then men to report being victims of intimate partner violence whether it is rape, physical assault, or stalking and whether the timeframe is the person's lifetime or the previous twelve months.[102] Additionally, the survey found that, in the months prior to the survey, women who were physically assaulted by an intimate partner averaged 3.4 physical assaults by the same partner, but men averaged 3.5 assaults.[103] Finally, the survey found "that 41.5 percent of the women who were physically assaulted by an inti-

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96. Deborah Epstein, *Redefining the State's Response to Domestic Violence: Past Victories and Future Challenges*, 1 GEO. J. GENDER & L. 127, 127-143 (1999).

97. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN (2000).

98. *See id.* at iv.

99. *See id.* at 26.

100. *See id.* at 27-28.

101. *Id.* at 28.

102. *See id.* at 25.

103. *See id.* at 26-27.

mate partner were injured during their most recent assault," versus 19.9% of the men.[104]

Despite the development and progress of domestic violence legislative efforts, many victims nonetheless choose to remain in the abusive situation and/or refuse to leave their abuser. While such behavior may seem rather counterintuitive, Dr. Nancy Faulkner's groundbreaking research in this area has identified ten reasons why a woman may decide to stay in an abusive relationship:[105]

1. Being afraid to lose a comfortable lifestyle.
2. Being blind to the point not to recognize the abuse or having been so used to it that it is not seen as abuse.
3. Being afraid to be alone for the rest of her life.
4. Shifting the blame to herself: "I deserved it; I'll do better."
5. Assuming that she has the situation under control: "I can keep it from happening again."
6. Assuming that it is an isolated situation: "He's really sorry this time, and it won't happen again."
7. Pretending that the situation is not as bad as it seems: "I know I make him sound terrible, but he's really a good person most of the time."
8. Justifying the abuser's behavior: "He didn't mean to hurt me." "No one else understands him the way I do."
9. Justifying why not to report the problem: "But I love him."
10. Being afraid of the abuser: "He'll kill me if I try to leave him."[106]

Unfortunately, many women who remain in these lethally abusive relationships ultimately end up killing their abusers. One of the most perplexing problems for the U.S. legal system has been how to deal with battered and/or abused women who commit such crimes. Oftentimes, when these women have been charged with murder, they have sought to introduce expert testimony relating to the "battered woman syndrome"[107] as a means of availing themselves to the defense of self-de-

104. *Id.*

105. *See* NANCY FAULKNER, DOMESTIC VIOLENCE: WHY WOMEN STAY (1997), *available at* http://www.prevent-abuse-now.com/domviol.htm.

106. *Id.*

107. *See, e.g.*, Georgia Wralstad Ulmschneider, *Rape and Battered Women's Self-Defense Trials as "Political Trials:" New Perspectives on Feminists' Legal Reform Efforts and Traditional "Political Trials" Concepts*, 29 SUFFOLK U. L. REV. 85, 92 n.54 (1995) (citing CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 157 (1989)); Rocco C. Cipparone, Jr., Comment, *The Defense of Battered Women Who Kill*, 135 U. PA. L. REV. 427, 429-31 (1987).

fense.[108] These efforts, however, have often been met by resistant courts that are unwilling to find the "imminent danger" component typically necessary for a self-defense to have been satisfied.[109] Historically, under Anglo-American legal principles an individual seeking to avail him/herself of the defense of self-defense to combat the use of deadly force has had to satisfy the "imminent danger" requirement.[110] Because many women who kill their abusers do not typically kill in the "heat of the moment" of a violent episode, but rather wait until a later time, many courts find that the "imminent danger" requirement is not met and refuse to allow a defense of self-defense.[111]

St. Mary's Law Survey Results

The survey conducted at St. Mary's Law found that 36% of the men and 40% of the women respondents did not believe that women who are victims of domestic violence and "choose" to remain in such an environment, are acting with free will. Comparatively, 26% of the men and 21% of the women believed that, to some extent, the women did choose to stay. Additionally, another 29% of the men and 31% of the women indicated that they would have to look at the situation on a case-by-case basis before deciding.

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108. *See, e.g.*, People v. Humphrey, 921 P.2d 1 (Cal. 1996); State v. Norman, 378 S.E.2d 8 (N.C. 1989); *see also* Moran v. Ohio, 469 U.S. 948, 950 n.2 (1984) (describing the battered women's syndrome and its acceptance as a legal theory of self-defense).

109. *See Humphrey*, 921 P.2d; *Norman* 378 S.E.2d.

110. *See, e.g.*, *Humphrey*, 921 P.2d; *Norman*, 378 S.E.2d; *see also* Donald L. Creach, Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615, 616, 619 (1982); Sarah Baseden Vandenbraak, Note, *Limits on the Use of Defensive Force To Prevent Intramarital Assaults*, 10 RUTGERS-CAM. L.J. 643, 644, 650-51, 658 (1979).

111. *See Norman* 378 S.E.2d at 16. However, not all courts have refused to relax or reconceptualize the "imminent danger" requirement necessary for a self-defense theory. *See* Fielder v. State, 683 S.W.2d 565 (Tex. App. – Fort Worth 1985), *rev'd on other grounds*, 756 S.W.2d 309 (Tex. Crim. App. 1988). Impressively, the court of appeals in *Fielder* recognized that:

> The battered woman experiences feelings of anxiety, self-blame, isolation and fear. She lives in a state of fear; the constant fear of being subjected to further violence by her batterer. When and if the battered woman strikes back at her batterer, often killing him, it usually occurs in one of two situations: 1) in direct response to provocation or aggression by the batterer; or 2) pursuant to no direct provocation, but out of a desire to be free from the situation and safe from her tormentor. In both situations, it can fairly be said that the battered woman perceives herself as acting in self-defense. Where the defendant acts in the absence of provocation it is obvious that testimony on the battered woman syndrome would be relevant to show the reasonableness of the defendant's fears and of her perceptions that such acts were necessary to protect herself under the circumstances.

Id. at 587-88.

With respect to a defense of "self-defense," the respondents were asked if the "imminent danger" requirement should be waived for women victims of domestic violence. Here the answers differed significantly between the sexes. For example, while 23% of the men and 19% of the women agreed with waiving such a requirement in the context of domestic violence victims, 15% of the women compared to 33% of the men did not agree with such a waiver. Moreover, while 30% of the women agreed that the waiver should be given at least in some cases, only 13% of the men concurred.

The respondents were also asked if they agreed with the enactment of special laws and provisions which would give women victims of domestic violence a specific legal defense when and if they were to kill their abuser. The survey found a varying amount of support for such a measure.

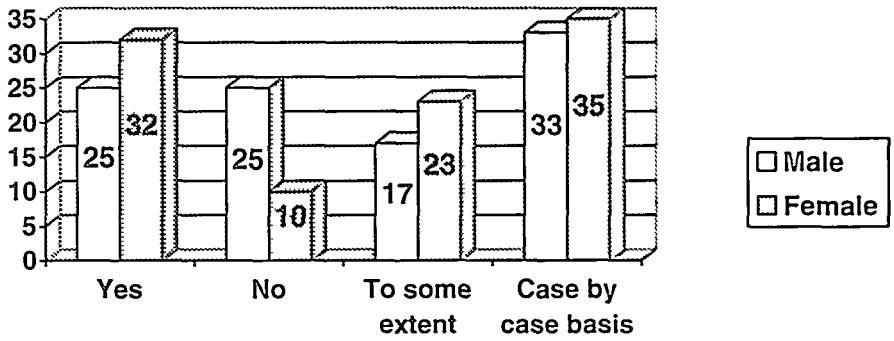

FIGURE VIII: SUPPORT LEGISLATION CREATING A DEFENSE FOR WOMEN WHO KILL THEIR ABUSERS

Finally, the respondents were also asked if they would have the same opinion to the above cited question if, instead, the husband were the one who killed his wife because of her violence against him. The survey found that 79% of males and 85% of females would still support the creation of a specific legal defense for the victims of such violence.

VI. ABORTION AND REPRODUCTIVE RIGHTS

In her recently published casebook, *Sex Equality*,[112] Professor Catharine A. MacKinnon introduces the "Reproductive Control" chapter by astutely observing,

112. SEX EQUALITY (Catharine A. MacKinnon ed., 2001).

> An experience of personal joy, pride, meaning, and satisfaction for many women, motherhood can also, under conditions of sex inequality, bring exploitation and abuse, confinement to breeding and serving, constricted participation in public life, material deprivation, and dependency sealed within a subordinate, narrow, and impoverished position in society.[113]

As eloquently expressed and captured by this passage, it is clear that the issue of women's reproductive rights remains a complex and difficult issue with enormously significant and sensitive legal, social and political ramifications. Much of the controversy surrounding the issue of reproductive rights continues to center on the seminal issue of abortion – including whether, how and when abortions should be allowed, and who should be the primary decision-maker(s) in this context.

While the United States Supreme Court's 1973 landmark ruling in *Roe v. Wade*,[114] established that a woman's decision whether to terminate her pregnancy is a constitutionally protected "fundamental right" under the 14th Amendment's "concept of personal liberty and restriction on state action,"[115] this ruling has neither been the definitive nor final legal pronouncement on this matter.[116] In one of the more significant cases fol-

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113. *Id.* at 1191; *see also* Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 197 (2001) (theorizing that "saying no to sex" is the same as "saying yes to power"); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1319-20 (1991) (exploring how only women can be disadvantaged by not being allowed a legal abortion); Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1737-38 (1991) (recounting examples of how women were regarded as breeding stock); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER SOC. POL'Y & L. 1, 4 (1993) (expressing how a pregnant black teenager experiences self-affirmation while society deems her position as self-inflicted poverty). *See generally* Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 337 (recalling how the sale of slave children denied subordinated slaves the joys of motherhood).

114. 410 U.S. 113 (1973).

115. *Id.* at 153 (White, J., concurring in result). *See generally* Stephanie Lee Black, Comment, *Competing Interests in the Fetus: A Look into Parental Rights After* Planned Parenthood v. Casey, 28 WAKE FOREST L. REV. 987, 1004 (1993); Andrea M. Sharrin, Note, *Potential Fathers and Abortion: A Woman's Womb Is Not a Man's Castle*, 55 BROOK. L. REV. 1359, 1366 (1990).

116. Most recently, for example, by a 5-4 vote, the Supreme Court struck down a Nebraska statute which banned the so-called "partial birth abortion." *See* Stenberg v. Carhart, 530 U.S. 914 (2000); *see also* Margaret S. v. Edwards, 794 F.2d 994, 996 n.3 (5th Cir. 1986) (declaring that lower courts "are not obliged to give expansive readings to a jurisprudence that the whole world knows is swirling in uncertainty"). *See generally* Elsa M. Shartsis, Casey *and Abortion Rights in Michigan*, 10 T.M. COOLEY L. REV. 313, 320-325 (1993) (discussing cases which followed *Roe*); Selina K. Hewitt, Note, Hodgson v. Minnesota: *Chipping Away at* Roe v. Wade *in the Aftermath of* Webster, 18 PEPP. L. REV. 955, 962

lowing *Roe*, the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[117] refused to overrule *Roe*, and instead explicitly upheld the "central holding" of the case, declaring, "[t]he woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce."[118]

In *Casey*, the Court entertained constitutional challenges to five provisions of the Pennsylvania Abortion Control Act of 1982.[119] While reaffirming the central holding in *Roe*, the *Casey* court nevertheless took issue with one of *Roe's* fundamental premises. In *Roe*, the Court held that as the viability of the fetus to live outside of the womb increased, the state's necessary "compelling" interest in regulating the matter correspondingly increased.[120] Continuing further, the *Roe* Court established a trimester framework wherein the state's interest in a woman's pregnancy is different, and greater, in each of the successive 12-week trimesters of pregnancy.[121]

(1991) (postulating that *Roe* allowed states to regulate abortion if they could articulate and demonstrate a compelling reason).

117. 505 U.S. 833 (1992).

118. *See id.* at 871. Undeterred by the Supreme Court's persistent refusal to overrule *Roe*'s "central holding," however, a multitude of other policies and legislation, both state and federal, have been enacted in an effort to protect the fetus. In one recent Supreme Court ruling, for example, the Supreme Court struck down a public hospital's practice of testing its pregnant clients for drugs and reporting the results to the police as an unreasonable search and seizure under the Fourth Amendment. *See* Ferguson v. City of Charleston, 532 U.S. 67 (2001); *see also* Cuellar v. State, 957 S.W.2d 134 (Tex. App. - Corpus Christi 1997) (involving challenge to state statute by defendant convicted of intoxication manslaughter and sentenced to sixteen years imprisonment for causing the death of a fetus in the mother's womb); Christa J. Richer, Note, *Fetal Abuse Law: Punitive Approach and the Honorable Status of Motherhood*, 50 SYRACUSE L. REV. 1127 (2000); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975, 975 (1992). At the federal level, Congress is currently entertaining legislation which would make it a crime to harm a fetus. *See* Unborn Victims of Violence Act, H.R. 503, 107th Cong. 1st Sess. (2001).

119. The five provisions required the following: i) Section 3205 required that a woman seeking an abortion give her informed consent prior to the procedure and that she be provided with certain information at least 24 hours before the abortion was performed; ii) Section 3206 required that a minor obtain the informed consent of at least one parent, but provided a judicial bypass option if the minor did not wish to or could not obtain the necessary parental consent; iii) Section 3209 (spousal notice) is described more fully in the text herein; iv) Section 3203 addressed and defined "medical emergency" which in turn provided an exemption from Sections 3205, 3206, and 3209; and v) Sections 3207(b), 3214(a) and 3214(f) imposed certain reporting requirements on facilities that provided abortion services. *See Casey*, 505 U.S. at 844.

120. *See Roe*, 410 U.S. at 162-63.

121. *See id.* at 164-65.

Significantly, the Joint Opinion[122] in *Casey* declared, "We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*."[123] While rejecting the trimester framework, however, these three justices nevertheless affirmed the correctness of *Roe*'s focus on the issue of viability, declaring, "We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy . . . and there is no line other than viability which is more workable."[124]

The Joint Opinion also determined that "strict scrutiny" was no longer the appropriate standard of review in the context of abortion rights, and instead announced a new "undue burden" standard.[125] Applying the newly articulated "undue burden" standard to each of the five provisions at issue in the case, the Court upheld four of the provisions, and struck down only one, Section 3209—the spousal notice provision. Section 3209 required that unless certain exceptions applied—generally domestic violence and cruelty—a married woman had to sign a statement that her husband had been notified of her intended abortion.[126] A physician per-

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122. Perhaps as evidence of the divisiveness of the issue, the *Casey* ruling was issued in a very splintered manner without a traditional majority and/or plurality opinion of the Court. Instead, the main opinion was issued by Justices O'Connor, Kennedy and Souter and referred to as the "Joint Opinion." *See Casey*, 505 U.S. at 840. Portions, but by no means all, of the Joint Opinion were then joined by Justices Blackmun and Stevens. Justice Stevens delivered an opinion concurring in part and dissenting in part with the Joint Opinion. *See id.* at 911. Justice Blackmun delivered an opinion concurring in part, concurring in the judgment in part, and dissenting in part with the Joint Opinion. *See id.* at 922. Chief Justice Rehnquist delivered an opinion concurring in the judgment in part and dissenting in part, which was joined by Justices White, Scalia and Thomas. *See id.* at 944. Finally, Justice Scalia delivered an opinion concurring in the judgment in part and dissenting in part, in which he was joined by the Chief Justice and Justices White and Thomas. *See id.* at 979.

123. *Id.* at 873 (O'Connor, Kennedy & Souter, JJ., joint opinion).

124. *Id.* at 870 (O'Connor, Kennedy & Souter, JJ., joint opinion).

125. On this point, the Joint Opinion determined,

> The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an *undue burden* on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause. . . . A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.

Id. at 874 (O'Connor, Kennedy & Souter, JJ., joint opinion) (emphasis added).

126. *See id.* at 844 (O'Connor, Kennedy & Souter, JJ., joint opinion). A woman also had the option of signing a statement certifying that her husband was not the man who impregnated her; that her husband could not be located; that the pregnancy was the result of spousal sexual assault which she had reported; or that the woman believed that notifying her husband would cause him or someone else to inflict bodily injury upon her. *See id.* at 908-09 (O'Connor, Kennedy, & Souter, JJ., appendix to joint opinion).

forming an abortion upon a married woman, without the appropriate signed statement, was subject to having his or her license revoked, and liability to the husband for money damages.[127] After reviewing much of the data with respect to domestic violence and family violence against children, the Joint Opinion, joined by Justices Stevens and Blackmun, struck down Section 3209. In so doing, the five justices forcefully declared, "The unfortunate yet persisting conditions we document above will mean that in a large fraction of the cases in which [Section] 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore, invalid."[128]

St. Mary's Law Survey Results

Despite the unquestionable and sustained longevity of the *Roe* decision, much of the controversy in the reproductive rights arena continues to revolve around the issue of whether, despite its—albeit limited—legality, abortion is the moral equivalent of murder. Toward this end, the St. Mary's survey asked respondents whether they believed abortion constituted the murder of a human being. The survey found that 38% of the men and 28% of the women agreed that abortion constituted murder. By comparison, 33% of the men and 39% of the women indicated that they would first consider the circumstances before determining whether a particular abortion constituted murder.

With respect to *Roe*'s trimester framework rejected by the Joint Opinion authors in *Casey*, the respondents in the survey were asked at what point, if ever, it was appropriate for the government to step in and prohibit abortions. Respondents were given the following six choices: 1) first trimester, 2) second trimester, 3) third trimester, 4) never, 5) "do not know", 6) "will consider the circumstances." In addition, a seventh option—"always"—was not a part of the survey, but was nevertheless added by a significant number of the respondents and is, therefore, part of the reported data.

As the chart below demonstrates, there was a wide and interesting variance and distribution of the respondents' answers. Perhaps the most noteworthy result was the dramatic difference between men and women in their respective number one choices. The highest answer chosen by men, and the highest answer chosen overall—45 percent of all male respondents—was the "will consider the circumstances" option. For women, by comparison, the highest answer chosen—27 percent of all female respondents—was the "third trimester" option.

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127. *See id.* at 887-88 (O'Connor, Kennedy & Souter, JJ., joint opinion).

128. *Id.* at 897 (O'Connor, Kennedy & Souter, JJ., joint opinion).

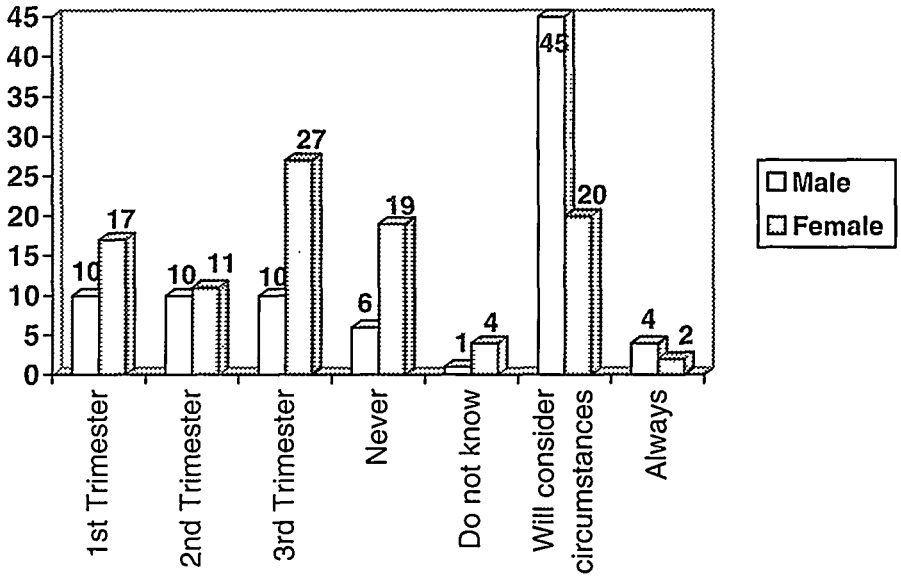

FIGURE IX: WHEN SHOULD GOVERNMENT PROHIBIT ABORTION?

Finally, with respect to the difficult issues revolving around decision-making authority and spousal notice, respondents were asked who should decide whether to terminate a pregnancy. The survey found that 72% of the men and 46% of the women agreed that both the father and the mother should decide this issue together. Surprising to the authors, only 53% of the women agreed that the woman alone should be able to make this decision without consulting the father.

VII. CONCLUSION

In 1994, the influential article *Becoming Gentlemen: Women's Experiences at One Ivy League Law School* was published by the University of Pennsylvania Law Review.[129] As with the instant article, *Becoming Gentlemen*, and the resulting book,[130] actually grew out of an initial student project by a first-year student, Ann Bartow, at the University of Pennsylvania.[131] Since the publication of *Becoming Gentlemen*, a great deal of similar and related literature documenting and chronicling women's ex-

129. Guiner et al., *supra* note 7.

130. LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE (1997).

131. *See* Bartow, *supra* note 7.

periences in legal education and the legal workforce has followed.[132] Most recently, the May 2001 volume of the University of Kansas Law Review published a symposium issue focused broadly on women's experiences with the American legal system.[133] In this symposium issue, Ann Bartow, now herself a professor of law, contributes an update piece to *Becoming Gentlemen*, entitled *Still Not Behaving Like Gentlemen.*[134] In this piece, Professor Bartow concludes,

> *Becoming Gentlemen*, and most of the similar scholarship that predated or followed it, was predicated not on disgracing or dismantling law schools, but on improving them by identifying problems, positing solutions, and encouraging additional research.[135]

As discussed earlier, while the instant work touches upon women's experiences at one law school, it also goes beyond to survey both women and men law students' opinions on a variety of complex and controversial legal issues of particular concern to women. In this way, we can perhaps begin to understand better how those intimately involved with the legal system – law students who will become lawyers, judges, and perhaps legislators – and the views that they hold, affect the ways in which laws and policy that most directly affect women in the United States are ultimately constructed, interpreted and enforced.

It is our hope, therefore, that this work is responsive to Professor Ann Bartow's recently articulated aspiration for continued dialogue and research on these issues. Moreover, it is also our hope that our contribution to this body of literature will inspire others to pursue additional research that is not similarly restricted by our post-survey-administration analysis of the data. Because it was not until the data from this student project began to come in that we realized we had the beginnings of a significant and meaningful contribution, it was also not until such time that we experienced an epiphany regarding what we would have done differently in terms of providing for better construction of the survey and analysis of the data so that the results would rise to the statistically meaningful level – something which we quite simply did not consider when this effort began as a class project. Recognizing these restrictions and limitations, we nevertheless view our results as important, informative, and worthy of sharing with others. Finally, we invite and hope to inspire

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132. *See, e.g.*, Barbara Allen Babcock, *Foreword: A Real Revolution*, 49 KAN. L. REV. 719 n.2 (2001).

133. *See* Symposium, *Women and the Legal Profession: Past and Future*, 49 KAN. L. REV. 719 (2001).

134. *See* Bartow, *supra* note 7.

135. *Id.* at 884.

others to continue, and perhaps build upon, this work in a more exacting manner.